Supreme Court, U.S.
FILED
MAY 10 1999
CLERK

No. 98-1440

IN THE
# Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,
*Petitioner,*
v.
REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF FOR THE PETITIONER

JAMES J. KEIGHTLEY *
*General Counsel*
WILLIAM G. BEYER
*Deputy General Counsel*
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
*Assistant General Counsels*
GARTH D. WILSON
NATHANIEL RAYLE
KENNETH J. COOPER
JAMES C. MCCARROLL
*Attorneys*
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

*Of Counsel:*
RICHARD K. WILLARD
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF AUTHORITIES

CASES CITED


| | Page |
|---|---|
| *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 67 U.S.L.W. 4275 (U.S. May 3, 1999) | 3 |
| *Batterton v. Francis*, 432 U.S. 416 (1977) | 3 |
| *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) | 3 |
| *Columbia Packing Co., In re*, 47 B.R. 126 (Bankr. D. Mass. 1985), *aff'd*, 81 B.R. 205 (D. Mass. 1988) | 4 |
| *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381 (11th Cir. 1990) | 3 |
| *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir. 1995) | 5 |
| *PBGC v. LTV Corp.*, 496 U.S. 633 (1990) | 2 |
| *PBGC v. LTV Corp.*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990) | 4 |
| *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997) | 4 |
| *Reading Co. v. Brown*, 391 U.S. 471 (1968) | 4, 6 |
| *UMWA 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273 (10th Cir. 1998) | 5 |
| *United States v. O'Hagan*, 117 S. Ct. 2199 (1997) | 3 |
| *Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573 (6th Cir. 1998) | 4 |
| *Vanston Bondholders Protective Comm. v. Green*, 329 U.S 156 (1946) | 3 |
| *Wyle v. Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476 (9th Cir. 1983) | 4 |


UNITED STATES CODE (1988) CITED


| | |
|---|---|
| 5 U.S.C. | |
| Section 706(2)(A) | 3 |
| 11 U.S.C. | |
| Section 102(3) | 5 |
| Section 502(b) | 4 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Section 503(b) | 5 |
| Section 506(b) | 3 |
| Section 507(a)(4) | 5 |
| Section 1129(a)(9)(C) | 4 |
| 26 U.S.C. | |
| Section 412 | 5 |
| Section 6621 | 4 |
| 29 U.S.C. | |
| Section 1082 | 5 |
| Section 1301(a)(18) | 3 |
| OTHER AUTHORITIES CITED | |
| 58 Fed. Reg. 50,812 (1993) | 2 |
| 61 Fed. Reg. 34,002 (1996) | 2 |
| GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving but Long-Term Risks Remain (1998) | 6 |
| *The 1999 Bankruptcy Yearbook & Almanac* (Christopher M. McHugh ed., forthcoming June 1999) | 6 |
| 1992 PBGC Ann. Rep. | 6 |
| 1993 PBGC Ann. Rep. | 6 |
| 1996 PBGC Ann. Rep. | 6 |
| 1998 PBGC Ann. Rep. | 6, 7 |

IN THE

# Supreme Court of the United States

No. 98-1440

PENSION BENEFIT GUARANTY CORPORATION,
*Petitioner*,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF FOR THE PETITIONER

1. In its petition, PBGC identified two questions of vital importance to the pension insurance program—issues that constantly arise in the hundreds of bankruptcy cases in which PBGC is a creditor. The briefs in opposition do not dispute that decisions like the one below distort the economic incentives faced by financially distressed companies with underfunded pension plans. By permitting debtors to reduce dramatically their termination liability from the amount otherwise owing under nonbankruptcy law, Pet. 14-16, and by leaving them little or no incentive to comply with the minimum funding standard, Pet. 16-18, the decision below invites companies to follow CF&I's example and abandon their underfunded pension plans in bankruptcy, thus forcing PBGC to terminate their plans. The decision encourages financially troubled companies—

both those contemplating bankruptcy and those already in it—to shift their pension liabilities to the insurance system, and ultimately to other premium payers. The decision is also sharply at odds with principles of administrative law, with this Court's approach to harmonizing statutes, and with the precise language of ERISA and the Bankruptcy Code. Because of its far-reaching impact and potential for abuse, this decision has prompted the agency, for the first time in a decade, to petition this Court for review. *See PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

2. Amendments to PBGC's regulation on calculating termination liability do not make this case "obsolete." Brief for Debtors at 12; Brief for USWA at 20. Debtors explicitly concede that they "do not challenge" the regulation as an "improper construction of ERISA," but only whether it should be applied in bankruptcy. Brief for Debtors at 22-23. Similarly, the decision below was not based on the unreasonableness of any particular assumption in the regulation. Rather, it rested on the court's conclusion that no PBGC regulation on calculating termination liability, even if promulgated under an express delegation, could apply in bankruptcy. Under these circumstances, changes in the technical specifications of the regulation are irrelevant to the legal issue presented in this case.[1]

---

[1] Respondents also misstate the effect of the 1993 amendment to this regulation, which was in large part a matter of presentation, intended to dispel "public confusion" and "enhance public understanding." 58 Fed. Reg. 50,812 (1993) (excerpt reprinted at Resp. App. 18a-19a). The preamble explained that the regulation's basic method remained the same: "[T]he amendment continues the regulation's historical approach of assigning values to annuity benefits that are in line with private sector group annuity prices, and the PBGC anticipates that, for most plans, this amendment will not significantly affect the valuations produced . . . ." Resp. App. 18a. The 1996 amendment was merely a "renumbering and reorganization" of PBGC regulations with no effect on substantive legal requirements. 61 Fed. Reg. 34,002 (1996).

3. The briefs in opposition reinforce the conclusion that this case presents fundamental questions at the intersection of administrative law and bankruptcy law. Respondents contend that legislative rules for calculating liability to an agency are presumed not to apply in bankruptcy, unless the agency's organic statute expressly so provides. *See* Brief for Debtors at 23; Brief for USWA at 22 n.32. Debtors attempt to distinguish *Batterton v. Francis*, 432 U.S. 416 (1977), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that PBGC does not "administer" the Bankruptcy Code, has no "expertise" in bankruptcy, and is therefore not entitled to "deference." Brief for Debtors at 21-22. By contrast, PBGC argues that the applicability of its regulation does not rest on judicial deference to the agency's expertise. Rather, its power to prescribe regulatory assumptions for computing liability flows from an express congressional delegation of legislative rulemaking authority. *See* 29 U.S.C. § 1301(a)(18); *Batterton*, 432 U.S. at 416-17 & n.9; *accord United States v. O'Hagan*, 117 S. Ct. 2199, 2217-18 (1997). Thus, the parties' briefs cleanly frame the important question whether bankruptcy courts have power to displace legislative regulations acknowledged to have the "force of law," Pet. App. 15a, under standards other than those set forth in the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A).[2]

---

[2] *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), *see* Brief for USWA at 21-22, did not authorize bankruptcy courts to adjust the principal amount of a secured creditor's claim, but was limited to the allowance of postpetition interest on interest. 329 U.S. at 162-63. This subject is now addressed by a provision of the Bankruptcy Code. 11 U.S.C. § 506(b). *See Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1386 (11th Cir. 1990). In fact, "it was . . . one of the Code's innovations to narrow the occasions for courts to make valuation judgments . . . ." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle*

4. The briefs in opposition also confirm that the priority of PBGC's minimum funding contribution claim presents an issue worthy of certiorari. The case law on this question is considerably less coherent than the USWA portrays.[3] Brief for USWA at 12-13 & n.20. Respondents do not dispute that the cost of complying with a federal statute can be an administrative expense. Instead, they

---

*St. Partnership*, 67 U.S.L.W. 4275, 4281 (U.S. May 3, 1999). Consistent with that approach, and in contrast to the court below, the Sixth Circuit recently held that *Vanston* did not permit a bankruptcy court to substitute its own discount factor, based on "general equitable principles," for an interest rate set forth in the non-bankruptcy law under which the claim arose. *Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 579 (6th Cir. 1998).

As for cases involving the statutory interest rate under 26 U.S.C. § 6621, Brief for USWA at 24, these decisions do not deal at all with determining the allowed amount of a claim under 11 U.S.C. § 502(b), but rather with determining the value of the bankruptcy estate's delayed payment of an allowed claim. 11 U.S.C. § 1129(a)(9)(C). Such "cram-down" cases, involving standards for confirming a plan of reorganization, have been characterized as "a distant cousin to the case before this Court." *Highland Superstores*, 154 F.3d at 580-81.

[3] The USWA cites two circuit opinions—dictum from a now reversed Second Circuit decision, *PBGC v. LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. at 656, and the majority of a divided panel of the Sixth Circuit, *PBGC v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811 (6th Cir. 1997). The USWA distinguishes a Ninth Circuit decision, *Wyle v. Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476, 479-80 (9th Cir. 1983), as arising under the Bankruptcy Act without explaining why that would make a difference in interpreting *Reading Co. v. Brown*, 391 U.S. 471, 483-85 (1968), which also arose under the Bankruptcy Act. And it fails to distinguish at all a proceeding in which both the bankruptcy court and district court explicitly adopted PBGC's basic reasoning—that minimum funding contributions accruing postpetition are a present cost of doing business. *In re Columbia Packing Co.*, 47 B.R. 126, 131 (Bankr. D. Mass. 1985), *aff'd*, 81 B.R. 205, 208-09 (D. Mass. 1988).

begin with the premise that the claim is "contractual," and then rely on cases holding that a contractual claim "arises" for purposes of bankruptcy when the "consideration" is furnished. Brief for USWA at 14-15; Brief for Debtors at 16-18. On the contrary, making minimum funding contributions to a pension plan is a statutory duty imposed by the Internal Revenue Code, 26 U.S.C. § 412, and ERISA, 29 U.S.C. § 1082, on employers who maintain pension plans, and is not a quid pro quo for employee labor.[4] The priority minimum funding claim arises solely from CF&I's continued sponsorship of the Plan postpetition without paying the statutorily required contributions. Indeed, had CF&I terminated the Plan before filing for bankruptcy, this priority claim would never have arisen at all, notwithstanding any labor that had been performed by CF&I's employees. Debtors suggest that the language of 11 U.S.C. § 507(a)(4)—granting priority to certain *pre*petition pension contributions—limits the priority to be accorded to *post*petition expenses. Brief for Debtors at 15-16. But this is not consistent with the language of 11 U.S.C. § 503(b), which is a nonexhaustive list of administrative expenses. *See* 11 U.S.C. § 503(b) (stating that "there shall be allowed administrative expenses, . . . including" the six categories of expenses there enumerated); 11 U.S.C. § 102(3) (stating that the term "including" is "not limiting"). Given the court of appeals' acknowledgment that "the employer must meet these [minimum funding] standards until its plan is terminated . . . ," Pet. App. 3a, this Court should decide the important and recurring question whether such statutory obligations are "costs ordinarily incident to operation of a busi-

---

[4] *See LTV Steel Co. v. Shalala*, 53 F.3d 478, 496-98 (2d Cir. 1995) (rejecting argument that Coal Act contributions were "consideration" for employee labor); *UMWA 1992 Benefit Plan v. Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1277 (10th Cir. 1998) (same).

ness . . . ," *Reading*, 391 U.S. at 483, and thus administrative expenses.

5. PBGC's 1998 surplus in the single-employer program, Brief for USWA at 4, is no reason for this Court to deny the petition. Business bankruptcy filings in 1998 stood at a 17-year low. *See The 1999 Bankruptcy Yearbook & Almanac* (Christopher M. McHugh ed., forthcoming June 1999) (manuscript at 10, on file with editor). Because of high investment earnings and low claims in this strong economy, the insurance program is currently in the black. 1998 PBGC Ann. Rep. 3, 9. The period before 1996, however, consisted of 21 consecutive years of deficits, including a $2.7 billion deficit in 1992—the year of the CF&I plan termination—and a $2.9 billion deficit in 1993.[5] *See* 1996 PBGC Ann. Rep. 1; 1992 PBGC Ann. Rep. 1; 1993 PBGC Ann. Rep. 1. As the GAO recently recognized, "the underfunding of a few large plans or underfunding in several plans in certain industries poses a long-term risk to PBGC solvency." GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving, but Long-Term Risks Remain 9 (1998). PBGC classifies the underfunding for plans of financially weak companies as "reasonably possible" exposure for purposes of its financial statements, as required by generally accepted accounting principles. As of December 31, 1997, PBGC's estimated "reasonably possible" exposure ranged from $15 billion to $17 billion—a signifi-

---

[5] Debtors curiously assert that the existence of PBGC's "Early Warning Program"—a loss prevention program—somehow contradicts the proposition that bankruptcy is the main world in which the PBGC insurance fund operates. Brief for Debtors at 13-14 (citing 1998 PBGC Ann. Rep. 14 (excerpt reprinted at Resp. App. 14a)). On the contrary, a program for monitoring transactions that affect *ongoing* underfunded plans in no way conflicts with the fact that most of the liabilities against the PBGC insurance fund (i.e., from *terminated* pension plans) arise from the bankruptcies of plan sponsors. *See* Pet. 13-14.

cant risk in the event of a downturn. 1998 PBGC Ann. Rep. 11. The lengthy history of this case—nearly seven years in the making—illustrates why these questions should be decided now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. KEIGHTLEY *
*General Counsel*
WILLIAM G. BEYER
*Deputy General Counsel*
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
*Assistant General Counsels*
GARTH D. WILSON
NATHANIEL RAYLE
KENNETH J. COOPER
JAMES C. MCCARROLL
*Attorneys*

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

*Of Counsel:*
RICHARD K. WILLARD
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record

May 10, 1999